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AUG 31 2007

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY L. M. Little 217

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BEFORE A HEARING OFFICER

ARIZONA SUPREME COURT

IN THE MATTER OF A MEMBER OF)
THE STATE BAR OF ARIZONA,)

No. 06-0923

HEARING OFFICER'S REPORT

ROBERT M. FRISBEE,
Bar No. 018779,

Respondent.

The parties have filed a Tender of Admissions and Agreement for Discipline by Consent ("Tender") and a Joint Memorandum in Support of Agreement for Discipline by Consent ("Joint Memo") agreeing that Respondent Robert M. Frisbee ("Respondent") should receive a censure, make restitution, and receive probation for violating ERs 1.15(a), 1.15(c), 1.15(d)(3) and 1.16(d).

The State Bar was represented by James L. Burke, in negotiating the Tender, and Respondent represented himself. The Hearing Officer has determined that no hearing is necessary in order to rule on the Tender.

For reasons discussed in more detail below, the Hearing Officer recommends that the Tender be approved and accepted.

STIPULATED FACTS

1 At all relevant times, Respondent was an attorney licensed to practice law in Arizona, having been admitted to practice in this state on May 16, 1998.

1 2 On or about January 2005, Richard Garcia ("Garcia") retained Respondent
2 to represent him in a lawsuit pertaining to Garcia's bail bond business Respondent and
3 Garcia entered into a fee agreement which required Garcia to pay a nonrefundable
4 retainer fee of \$3,000 The fee agreement did not advise Garcia that if he discharged
5 Respondent, Garcia may be entitled to a refund of all or part of the fee based upon the
6 value of the representation

7 3 On or about February 10, 2005, Respondent advised Garcia that the
8 litigation would exceed the \$3,000 retainer and asked for additional money to pursue the
9 case Garcia paid the sum of \$10,000 to Respondent Respondent filed a complaint
10 against the opposing party on February 14, 2005 in the Superior Court of Arizona,
11 Maricopa County.

12 4 On or about July 15, 2005, Respondent sent a bill to Garcia requesting
13 payment of \$2,806 90 for legal services and expenses already rendered Respondent,
14 however, failed to take into account the \$10,000 amount paid by Garcia in February
15 2005 (the bill mentioned only that the \$3,000 nonrefundable retainer had been paid and
16 not the February 10th \$10,000 payment)

17 5 Subsequently, Garcia discharged Respondent from the case Respondent
18 failed to refund any of the money that Garcia paid in excess of the services rendered by
19 Respondent A bar complaint was lodged by Garcia against Respondent.

20 6 After the bar complaint was submitted and a formal complaint filed,
21 Respondent acknowledged receiving the \$10,000 payment from Garcia Respondent
22 reported that when he received the money, rather than depositing the fees into his client
23 trust account, Respondent deposited the money into his general operating account
24 Respondent also did not refund the unearned money (\$6,103.10) back to Garcia

25 7. Respondent has knowingly waived his right to a formal disciplinary
26 hearing to which he otherwise would have been entitled pursuant to Rule 53(c)(6),
27 Ariz R Sup Ct , as well as his right to testify and present witnesses on his own behalf at
28

1 such a hearing. Respondent has further waived all motions, defenses, objections or
2 requests that he has made or raised, or could assert hereafter, provided that the
3 conditional admissions and stated forms of discipline are not rejected by the
4 Disciplinary Commission or the Arizona Supreme Court

5 8 Respondent has acknowledged that he has read and reviewed the Tender,
6 and that he has submitted the Tender freely and voluntarily, and without coercion or
7 intimidation, and is aware of the Supreme Court Rules with respect to discipline

8 9 Respondent understands that the Disciplinary Commission must approve
9 this agreement and that this matter will become final only upon judgment and order of
10 the Supreme Court of Arizona

11 **CONDITIONAL ADMISSIONS**

12 10 Respondent has conditionally admitted that his conduct, as set forth
13 above, violated the following Rules of Professional Conduct ¹

14 a Rule 42, Ariz R Sup.Ct., ER 1 5(d)(3) - by denominating his fee as
15 "nonrefundable" and failing to advise his client that if the client discharged the
16 lawyer from the case, the client may be entitled to a refund of all or part of the
17 fee based upon the value of the representation,

18 b. Rule 42, Ariz R.Sup Ct , ER 1 15(a) - by failing to hold funds of a
19 client in Respondent's possession in connection with a representation in a
20 separate account from Respondent's own funds;

21 c. Rule 42, Ariz R Sup.Ct , ER 1 15(c) - by failing to deposit into a
22 client trust account legal fees and expenses that were paid in advance, to be
23 withdrawn by the lawyer only as fees were earned or expenses incurred; and

24 d Rule 42, Ariz R Sup Ct , ER 1 16(d) - by failing to refund an
25 advance payment of a fee that was not earned.

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27 ¹ If the agreement is rejected by either the Disciplinary Commission or the
28 Supreme Court of Arizona, the parties' conditional admissions and conditional
withdrawals shall automatically be considered to be withdrawn

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CONDITIONAL DISMISSALS

11. The State bar has agreed to conditionally dismiss the following violations alleged in the Amended Complaint in this matter Rule 42, Ariz R Sup Ct., ERs 1 2, 1 3. 1 4, 1 5, 3 2, 8 1(b) and Rules 43 and 44, Ariz R Sup Ct

12 If this matter was to proceed to a hearing, Respondent would present evidence that he had diligently pursued the prosecution of Garcia's case, requesting information from him that Respondent believed was necessary to sustain and prevail in the litigation According to Respondent, Garcia did not provide that information and Respondent believed Garcia had abandoned the case

13 If this matter was to proceed to a hearing, Respondent would also testify that he was in the process of providing an accounting to the State Bar, but did not realize or believe there was a time deadline for responding to the Bar's request

14 Moreover, the parties submit that the violations of Rule 43 and 44 alleged in the Amended Complaint all flow or stem from Respondent's failure to deposit the \$10,000 payment into Respondent's trust account Thus, if the money was placed into that account, these violations may not have occurred²

RESTITUTION

15 Respondent agrees to pay \$6,103.10 in restitution to Richard W. Garcia

² The Hearing Officer does not understand exactly what the parties meant when they included this language in the Tender The parties stipulated in paragraph 6 above that Respondent did not deposit the additional \$10,000 into his trust account, and that he had actually deposited such funds into his general operating account. The Hearing Officer believes, however, that the issue is irrelevant, and that the stipulated sanctions are appropriate even assuming the \$10,000 was deposited in Respondent's general operating account

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SANCTIONS

Agreed Upon Sanctions

16 The Hearing Officer agrees that based on the conditional admissions, the following sanctions agreed upon by the State Bar and Respondent should be imposed:

a Respondent should receive a censure for violations of Rule 42, Ariz R Sup Ct , specifically ER's 1 15(a), 1 15(c), 1 5(d)(3), and 1 16(d)

b Respondent should be placed on probation until such time as he attends and completes the State Bar's Trust Account Ethics Enhancement Program ("TAEHP") and meets with the SBA's Law Office Management Program coordinator ("LOMAP") for a session of up to two hours to assist with calendaring issues. After Respondent completes TAEHP and meets with the LOMAP coordinator, the probation term should be terminated.

c Respondent should be ordered to pay \$6,103.10 in restitution to Richard W. Garcia

d. Respondent should be ordered to pay all costs and expenses incurred by the State Bar in this disciplinary proceeding, as provided in the State Bar's statement of costs and expenses.³

e In the event that Respondent fails to comply with the foregoing terms of probation, and information thereof is received by the State Bar, Bar counsel should file a Notice of Non-Compliance pursuant to Rule 60(a)(5), Ariz R.Sup Ct., and this matter should then be referred to a hearing officer to conduct a hearing at the earliest practicable time, but in no event later than thirty days after receipt of notice, to determine whether a term of probation has been breached, and, if so, to recommend an appropriate action and response, with the burden of proof on the State Bar to prove any such non-compliance by clear and convincing evidence.

³ A listing of such costs is attached hereto as Exhibit "A"

1 **Appropriateness of Agreed Upon Sanctions**

2 17. In determining the appropriate sanction, Arizona generally follows the
3 ABA Standards for Imposing Lawyer Sanctions (the "Standards"). *In re Zawada*, 208
4 Ariz. 232, 92 P 3d 862 ¶ 12 (2004).

5 18 The Standards list the following factors to consider in imposing the
6 appropriate sanction

- 7 a the duty violated;
8 b the lawyer's mental state;
9 c the actual or potential injury caused by the lawyer's misconduct,
10 and
11 d the existence of aggravating or mitigating circumstances

12 ABA Standard 3 0 *Zawada* at ¶ 12 The Hearing Officer has considered all of the required
13 factors.

14
15 19 The theoretical framework analysis contained in the Standards states that
16 where there are multiple acts of misconduct, the sanction should be based upon the most
17 serious misconduct, with the other acts being considered as aggravating factors *See*
18 *also In re Moak*, 205 Ariz 351, 353, 71 P.3d 343, 345 (2003).

19 20. The parties have agreed that the most serious misconduct in this case is
20 Respondent's failure to refund an advance payment of a fee that was not earned upon
21 the termination of the representation

22 21 The parties have agreed that Standard 7 0, Violations of Other Duties
23 Owed as a Professional, is the most appropriate Standard

24 22 Standard 7 0 provides, in pertinent part

25 Absent aggravating or mitigating circumstances
26 Reprimand⁴ is generally appropriate when a lawyer
 neghently engages in conduct that is a violation of a duty

27 ⁴ In Arizona, what the Standards refer to as a "reprimand" is referred to as a
28 "censure."

owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

23 Based upon the conditional admissions in this matter, the presumptive sanction with regard to the most serious admissions of misconduct under Standard 7.0 is a censure

24 **The duty violated** Respondent negligently failed to refund a portion of the fees advanced by his client that were not earned. Respondent also failed to deposit the unearned client fees into his client trust account. Respondent has admitted that his conduct, taken as a whole, violated his duty to his client, the profession and the legal system.

25 **The lawyer's mental state.** The parties agree that Respondent's conduct was done negligently because Respondent was unaware of ER 1.5(d)(3). Courts have held that attorneys' ignorance of rules prohibiting nonrefundable retainers can be considered negligent for purposes of the ABA Standards. See *In re Sather*, 3 P.3d 403, 407-08 (Colo. 2000). See also *In re Cord*, 2001 Ariz. LEXIS 70 at *18 (2001) (attorneys' ignorance of trust account requirements held to be a negligent mental state for purposes of the ABA Standards).

26 **Extent of the actual or potential injury.** If this matter were to proceed to hearing, the State Bar would argue that Respondent's conduct in this matter caused actual injury to his client in that his client paid an advanced fee to Respondent, who then failed to refund the portion of unearned money upon termination of representation.

27 **Aggravating and/or Mitigating Circumstances** The parties have agreed that Respondent's lack of a prior disciplinary record should be considered in mitigation. The Hearing Officer, however, has given this circumstance no weight because it is balanced by Respondent's substantial experience in the practice of law,⁵ which is an aggravating factor under Standard 9.22(1). See *Matter of Shannon*, 179

⁵ The Hearing Officer takes judicial notice that although Respondent was only admitted in Arizona in 1998, he was first admitted in Minnesota in 1965.

1 Ariz 52, 876 P 2d 548 (1994), *modified in part or other grounds*, 181 Ariz. 307, 890
2 P 2d 602 (1994)

3 28 **Recommended Sanction.** Having considered all of the factors discussed
4 above, the Hearing Officer agrees with the parties that a **censure** is appropriate in this
5 matter.

6 **PROPORTIONALITY**

7 29 The last step in determining if a particular sanction is appropriate is to
8 assess whether the discipline is proportional to the discipline imposed in similar cases
9 *In re Van Doo*, ___ Ariz ___, 152 P.3d 1183 at ¶ 39 (2007)

10 30 Review of proportionality, however, is “an imperfect process because no
11 two cases are ever alike” *In re Owens*, 182 Ariz 121, 127, 893 P 2d 1284, 1290
12 (1995). As the Arizona Supreme Court stated in a recent discipline case:

13 Consideration of the sanctions imposed in similar cases is
14 necessary to preserve some degree of proportionality, ensure that the
15 sanction fits the offense, and avoid discipline by whim or caprice . .

16 Proportionality review however, is an imperfect process
17 Normally the fact that one person is punished more severely than
18 another involved in the same misconduct would not necessarily lead
19 to a modification of a disciplinary sanction Both the State Bar in its
20 capacity as prosecutor and the Disciplinary Commission in its quasi-
21 judicial capacity have broad discretion in seeking discipline and in
22 recommending sanctions

23 *In re Dean*, 212 Ariz 221, 225, 129 P.3d 943, 947 at ¶ 24(2006)

24 31 Because perfect uniformity cannot be achieved, the Arizona Supreme
25 Court has long recognized that the discipline in each situation must be tailored for the
26 individual case *In re Platt*, 191 Ariz 24, 31, 951 P 2d 889, 896 n.5 (1997)

27 39 The Hearing Officer has considered the cases cited by the parties in the
28 Joint Memo, and has performed independent research regarding similar cases Based on
this review of prior Arizona decisions, the Hearing Officer has exercised his
independent discretion, and has attempted to tailor the sanction in the present case to
match the specific circumstances presented

32 In the Joint Memo, the parties cited the following cases as supporting a

1 censure in this matter *In re Martin*, SB-06-0174-D (2006); *In re Levenson*, SB-02-
2 0130-D (2002), *In re Crimmins*, SB01-0043-D (2001). All three of these cases involved
3 censures imposed on attorneys to who failed to refund unearned retainers.

4 33 The Hearing Officer has also considered *In re Rogers*, SB-00-0050-D,
5 2000 Ariz. LEXIS 74 (2000). In *Rogers*, as in the present case, the attorney had a
6 written fee agreement with one client that stated that a retainer was "non-refundable"
7 The attorney, however, treated the funds received from the client like a normal retainer,
8 kept track of his time and expenses, and applied the retainer against the charges as they
9 were incurred. Although the case did discuss the propriety of non-refundable retainers,
10 because the attorney had not treated the retainer as non-refundable, and had also
11 outright misappropriated trust funds from another client, the attorney was suspended for
12 one year. Because the conduct at issue was more egregious than Respondent's conduct
13 in the present action, the Hearing Officer does not believe that *Rogers* justifies departure
14 from the presumptive sanction of a censure in the present case.

15 34 The Hearing Officer finds that the stipulated censure, followed by TAEPP
16 and LOMAP probation, is proportional to the discipline imposed in other similar cases

17 CONCLUSION

18 35. For the reasons discussed above, the Hearing Officer recommends the
19 following sanctions be imposed upon respondent Robert M. Frisbee.

- 20 a Respondent should receive a Censure
- 21 b Respondent should be placed on probation until such time as he attends
22 and completes the State Bar's Trust Account Ethics Enhancement
23 Program ("TAEPP") and meets with the SBA's Law Office Management
24 Program coordinator ("LOMAP") for a session of up to two hours to assist
25 with calendaring issues. After Respondent completes TAEPP and meets
26 with the LOMAP coordinator, the probation term should be terminated.
- 27 c Respondent should be ordered to pay \$6,103.10 in restitution to Richard
28

1 W Garcia.

2 d Respondent should be ordered to pay all costs and expenses incurred by
3 the State Bar in this disciplinary proceeding, as provided in the State Bar's
4 statement of costs and expenses

5 DATED August 30, 2007

6 HEARING OFFICER 7M

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8 

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11 ORIGINAL of the foregoing filed
12 August 30, 2007, to.

13 Disciplinary Clerk
14 Supreme Court of Arizona
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15 COPIES of the foregoing mailed
16 August 30, 2007, to

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